

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs May 14, 2007

JAMES FRANKLIN BROOKS v. SHEILA BROOKS TRAVIS

**Appeal from the Chancery Court for Lawrence County
No. 11152 Robert L. Holloway, Judge**

No. M2005-00768-COA-R3-CV - Filed on June 4, 2007

Mother appeals the trial court's decision to modify the parties' permanent parenting plan. The trial court modified the parties' parenting plan after Mother remarried and moved out of state. Mother contends the facts do not support a finding of a material change in circumstances. Finding that the facts support the trial court's finding of a material change in circumstances and the determination that the modification was in the best interests of the children, we affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court
Affirmed**

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and WILLIAM B. CAIN, J., joined.

Darlene Rebowe, Brentwood, Tennessee, for the appellant, Sheila Brooks Travis.

Robert D. Massey, Pulaski, Tennessee, for the appellee, James Franklin Brooks.

MEMORANDUM OPINION¹

James Brooks and Sheila Travis were divorced pursuant to a Marital Dissolution Agreement entered on February 4, 2003. At the time of the divorce the parties had three minor children, ages fifteen, thirteen, and eleven, and the parties agreed to a permanent parenting plan pursuant to which Mother was designated as the primary residential parent, and the children alternated weeks with their parents from Friday to Friday.

¹Tenn. Ct. App. R. 10 states:

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

At the time of the divorce, the parties lived in Lawrence County, Tennessee, but approximately three months after the divorce, in May, Mother remarried and moved in with her new husband and his two daughters in Hazel Green, Alabama, approximately ninety minutes from Lawrence County. The plan was for Mother to live there with her new husband while they were building a house on her family's land in Giles County, Tennessee.

The children have at all times attended school in Lawrence County, and they participate in extracurricular activities there. The two oldest children had jobs for the summer in Lawrence County. When the children were in Lawrence County at their Father's they worked with the farm animals and played with their friends. When the children were at their Mother's they spent large amounts of time playing games on the computer. The children had plenty of space at Mother's new home and at Father's home.

Since Mother's move to Hazel Green, the children had not been visiting Mother as frequently as what the Permanent Parenting Plan provided. Mother became frustrated with what she perceived to be Father's violations of the Permanent Parenting Plan, and in September 2003, she filed a Petition for Contempt against Father alleging various violations of the Permanent Parenting Plan. Father filed a response to Mother's Petition and also filed a Petition for a modification of the Permanent Parenting Plan.

The trial court conducted an evidentiary hearing on May 14, 2004. One month later the trial court entered an Order wherein it concluded that a material change in circumstances had occurred and that Father should be the primary residential parent. The court also determined that Mother would have visitation every other weekend from Friday, when Mother gets off work, until Monday morning, and that she would pay child support and maintain medical insurance for the children.

Mother appeals contending the facts do not support a finding of a material change in circumstances.

STANDARD OF REVIEW

This court reviews custody and visitation decisions *de novo* with a presumption that the trial court's findings of fact are correct unless the evidence preponderates otherwise. *Kendrick v. Shoemaker*, 90 S.W.3d 566, 569 (Tenn. 2002); *Nichols v. Nichols*, 792 S.W.2d 713, 716 (Tenn.1990). Moreover, appellate courts are reluctant to second-guess a trial court's determination regarding custody and visitation. *Parker v. Parker*, 986 S.W.2d 557, 563 (Tenn. 1999). This is because of the broad discretion given trial courts in matters of child custody, visitation and related issues. *Id.*; see also *Nelson v. Nelson*, 66 S.W.3d 896, 901 (Tenn. Ct. App. 2001). Custody decisions often hinge on subtle factors, such as the parents' demeanor and credibility during the proceedings. *Adelsperger v. Adelsperger*, 970 S.W.2d 482, 485 (Tenn. Ct. App. 1997). Accordingly, trial courts have broad discretion to fashion custody and visitation arrangements that best suit the unique circumstances of each case. *Parker v. Parker*, 986 S.W.2d 557, 563 (Tenn. 1999).

Furthermore, it is not the role of the appellate courts to "tweak [parenting plans] . . . in the hopes of achieving a more reasonable result than the trial court." *Eldridge v. Eldridge*, 42 S.W.3d 82, 88 (Tenn. 2001). This is particularly true when no error is evident from the record. *Id.* Thus, a trial court's decision regarding custody or visitation will be set aside only when it "falls outside the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record." *Id.*

THE MODIFICATION

A change in custody from one parent to another requires that the trial court engage in a two-step process. First, "the "threshold issue" is whether a material change in circumstances has occurred after the initial custody determination." *Kendrick v. Shoemaker*, 90 S.W.3d 566, 570 (Tenn. 2002) (citing *Blair v. Badenhope*, 77 S.W.3d 137, 150 (Tenn. 2002)). Second, after the trial court determines a material change in circumstances exists, "it must then be determined whether the modification is in the child's best interests." *Kendrick*, 90 S.W.3d at 570.

The trial court heard testimony from the parties and met with the children in chambers. After hearing all of the evidence, the court found that the cumulative effect of the parents not following the permanent parenting plan, Mother remarrying only a few months after the divorce, Mother moving out of state with her new husband and his children, and Mother's intent to move again to Giles County, Tennessee, all of which occurred in a matter of months, constituted a material change in circumstances since the entry of the original parenting plan.

After finding a material change in circumstances, the trial court determined that awarding primary custody to Father was in the children's best interests. This was based on the children's expressed preference to live with their father in the town where they had attended school for years, where they had friends, and summer jobs. The trial court also specifically found that the children were "mature, and seemed sincere and honest in expressing their preference."

The trial court is afforded broad discretion in matters of child custody, *see Parker*, 986 S.W.2d at 563, and it is not our place to second-guess the trial court or to tweak a parenting plan in the hope of achieving a more reasonable result than the trial court. *Eldridge*, 42 S.W.3d at 88. Having considered the entire record, we find no error with the trial court's decision. We, therefore, affirm the decision to modify the Permanent Parenting Plan.

FRIVOLOUS APPEAL

Father has asked that this court declare this appeal frivolous and award him damages in the form of attorneys' fees. We do not find Mother's appeal frivolous, and therefore deny Father's request for his attorneys' fees.

IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against Sheila Brooks Travis.

FRANK G. CLEMENT, JR., JUDGE